IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Balachandra Arachchige Don Nuwan Chathuranga Padmasiri,
   Sub Inspector
   Criminal Investigation Department
   P.O. Box 534, Colombo 01
2. Koskola Waththage Harsha Lakmal Kumara,
   Sub Inspector,
   Criminal Investigation Department,
   P.O. Box 534, Colombo 01.
3. Munasingha Arachchige Sajitha Chathusanka Bandara Karunathilaka,
   Sub Inspector,
   Police Station, Peliyagoda.

   Petitioners

SC/FR/46/2021

Vs.

1. C. D. Wickramaratne
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.
2. Jagath Balapatabendi,
   Chairman
3. Indrani Sugathadasa,
   Member

4. V. Shivagnanasothy,
   Member
5. T. R. C. Ruberu,
   Member
6. Ahamod Lebbe Mohamed Saleem,
   Member
7. Leelasena Liyanagama,
   Member
8. Dian Gomes,
   Member
9. Dilith Jayaweera,
   Member
10. W. H. Piyadasa,
    Member
    All of the members of the Public Service Commission of Sri Lanka, No. 1200/9, Rajamalwatta Road, Battaramulla.
11. K. R. Saranga Perera,
    Head of Division
    (Recruitment and Promotion Scheme Preparation Division)
    Police Headquarters
    Colombo 01
12. Wajira Gunawardena
    Director (Civil Administration)
    Sri Lanka Administration Division
    Police Headquarters
    Colombo 01
13. The Attorney-General,
    Attorney-General's Department.
    Respondents

Before: E. A. G. R. Amarasekara, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Manohara de Silva, P.C., with Nadeeshani Lankatilleka for the Petitioners.
Rajiv Goonetilleke, D.S.G., with Sureka Ahmed, S.C., for the Respondents.

Argued on: 15.12.2021

Written submissions:
by the Petitioners on 25.10.2021 and 24.01.2022
by the Respondents on 16.11.2021 and 21.01.2022

Decided on: 23.11.2022

Mahinda Samayawardhena, J.

Introduction

Two fundamental rights applications were filed by 164 Sub Inspectors of Police, making the Inspector General of Police (IGP) and the members of the Public Service Commission (PSC) respondents, alleging violation of fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution by the adoption of the Scheme of Recruitment (SOR) marked P7 for promotion from the rank of Sub Inspector (SI) to the rank of Inspector of Police (IP). Upon completion of the pleadings, the two applications were consolidated and heard together and the parties have agreed to abide by a single judgment. Hence this judgment will be binding on the parties in the connected case – SC/FR/55/2021.

Promotions in the police force is a complex and complicated issue. There is no policy in place on promotions and various schemes have been

adopted on an *ad hoc* basis from time to time to address the grievances of police officers as they arise. Unless and until a sound promotion policy is formulated taking into account the views of all stakeholders, this will be a recurring issue. The intensity of the issue is understood by looking at the schemes of promotion adopted in the recent past, as set out by the petitioners in the petition. A number of fundamental rights applications are pending before this Court on police promotions.

In the year 2010, as seen from P4, all Sub Inspectors who had completed eight years of service as at 08.02.2010 in the rank of SI were promoted to the rank of IP across the board, subject only to them having an unblemished record during the five years immediately preceding the date of promotion. This scheme was adopted to redress the frustration of senior officers due to stagnation in service; it only took into account seniority and there was no interview.

Thereafter, in the year 2016, as seen from P5, a different scheme was adopted for promotion from the post of SI to IP of officers who had completed 10 years of service in the rank of SI as at 31.05.2016; seniority and merit were both considered and there was a structured interview.

Subsequent to this, in the year 2020, once again in order to redress the frustration of senior officers due to stagnation in service, all Sub Inspectors who had completed eight years of service as at 31.12.2018 (provided salary increments had been earned), were promoted to the rank of IP despite not having the requisite qualifications set out in P5. This time, the number of years of service was reduced from 10 to eight and the structured interview was also dispensed with.

Then comes the scheme of recruitment in question adopted in 2020 marked P7, which provides for 4 categories of promotion:

CATEGORY	PERCENTAGE
Seniority	50%
Limited Competitive Examination	25%
Merit	25%
Special promotion	½ of the merit category (equal to12.5% of the total number of promotions)

As crystalised in the post-argument written submissions, the petitioners have three main grievances *vis-à-vis* P7:

(a) seniority has not been given due recognition
(b) awarding marks on good entries at the interview is discriminatory
(c) the category of special promotion is arbitrary

Before I consider these in detail, let me address the preliminary objection raised by learned Deputy Solicitor General (DSG) for the respondents regarding the maintainability of this application on time bar.

Time bar objection

The case record bears out that the Court has granted leave to proceed after hearing both learned President's Counsel for the petitioners and learned DSG for the respondents. It is in the objections filed by way of an affidavit of the 1st respondent IGP that the time bar objection is taken.

The time bar objection shall be taken at the earliest possible opportunity; otherwise it is deemed to have been waived. In terms of Article 134(1) of the Constitution read with Rule 44(6) of the Supreme Court Rules 1990, the Attorney General has the right of audience at the time of supporting the application for leave to proceed. Nevertheless, the fact remains that at that stage the Attorney General is ill-equipped to present the respondents' case completely, due to want of time and paucity of instructions. The Attorney General gets the first opportunity to present his case fully in the objections filed by way of an affidavit in terms of Rule

45(6) of the Supreme Court Rules 1990 after the granting of leave to proceed. Therefore taking up the time bar objection for the first time in the affidavit is permissible but that objection cannot be taken for the first time at the argument or in the written submissions. (*Ranaweera v. Sub Inspector Wilson Siriwardena* [2008] 1 Sri LR 260 at 272)

The impugned SOR marked P7 was approved by the PSC on 22.10.2020 and signed by the secretary to the PSC on 04.12.2020 (1R5A). According to the petitioners, P7 was not conveyed to them through their superiors as was usually done in the past. This is undisputed. The petitioners state that on or about 05.02.2021, they became aware of P7 by word of mouth and thereafter found P7 on the Police Department website. This application was filed by the petitioners on 25.02.2021. The IGP in his affidavit states that P7 was published on the official website of the Police Department on 12.01.2021 and since the petitioners have not invoked the fundamental rights jurisdiction of this Court within one month from the date of publication of P7 (i.e. within one month of the infringement complained of), the application is liable to be dismissed *in limine* in terms of Article 126(2) of the Constitution. The petitioners do not accept that publication on the website was done on 12.01.2021. There is no other item of evidence to corroborate the date of publication apart from the *ipse dixit* of the IGP. I will accept both positions: the IGP's position that the website publication was done on 12.01.2021 and the petitioners' position that they visited the website on or around 05.02.2021. Then have the petitioners filed this application within time?

Article 126(2) of the Constitution states that "*Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of*

court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement." The strict literal interpretation of this Article is that the time limit of one month set out in Article 126(2) is not open to interpretation and non-compliance warrants automatic dismissal of the application *in limine* without going into the merits of the complaint. In exercising the extraordinary and exclusive jurisdiction conferred upon this Court to protect the fundamental rights of the people, this Court, whilst emphatically emphasising that the time limit of one month is mandatory and shall be complied with, has nevertheless relaxed the rigidity of the time tag in appropriate cases by adopting a liberal as opposed to a literal interpretation of Article 126(2). This is predominantly done by the adoption of the maxim *lex non cogit ad impossibilia*: the law does not expect a man to do the impossible. Hence, it is accepted that the period of one month begins to run not from the date of violation of the right but from the date of becoming aware of the violation of the right or from the time of being in a position to take effective steps to come before the Supreme Court. The test to be applied is objective, not subjective.

By way of analogy, in terms of section 10 of the Prescription Ordinance, an action for a declaration that a notarially executed deed is null and void is prescribed within three years of the date of execution of the deed (*Ranasinghe v. De Silva* (1976) 78 NLR 500). Nonetheless, if the plaintiff seeks cancellation of a notarially executed deed upon concealed fraud, the three-year period begins to run not from the date of the execution of the deed but from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it (*Kirthisinghe v. Perera* (1922) 23 NLR 279).

In *Edirisuriya v. Navaratnam* [1985] 1 Sri LR 100 at 105-106, Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J. citing *Vadivel*

Mahenthiran v. AG (SC/68/1980, SC Minutes of 05.08.1980) and *Hewakuruppu v. G.A. de Silva, Tea Commissioner* (SC/118/84, SC Minutes of 10.11.1984) held that although the time limit of one month set out in Article 126(2) is mandatory, yet, in a fit case, the Court would entertain an application made outside the limit of one month, provided an adequate excuse for the delay could be adduced; and if the petitioner had been held incommunicado, the principle *lex non cogit ad impossibilia* would be applicable. This dictum was cited with approval in several later decisions including *Ranaweera v. Sub Inspector Wilson Siriwardena* [2008] 1 Sri LR 260 at 271.

In *Siriwardena v. Brigadier Rodrigo* [1986] 1 Sri LR 384 at 387, this Court held:

> *The period of one month specified in Sub-Article (2) of Article 126 of the Constitution would ordinarily begin to run from the very date the executive or administrative act, which is said to constitute the infringement, or the imminent infringement as the case may be, of the Fundamental Right relied on, was in fact committed. Where, however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case, the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.*

In *Dayaratne and others v. National Savings Bank and others* [2002] 3 Sri LR 116, the time bar objection (on the basis that interviews for promotions had been held and decisions taken more than one month before the application was filed) was rejected and the Court held that time began to run against the petitioners only when the names of the

promotees were announced. This indicates that the awareness of the petitioners is crucial when computing the one-month time bar.

In *Gamaethige v. Siriwardena* [1988] 1 Sri LR 384 at 401, M.D.H. Fernando J. acknowledged that this Court not only has discretion but also a duty to entertain a fundamental rights application filed out of time, depending on the unique facts and circumstances of the case.

> *The time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to involve the jurisdiction of this court, this Court has discretion, possibly even a duty, to entertain an application made within one months after the petitioner ceased to be subject to such restraint. The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man-made disaster, would have to be considered in an appropriate case when it arises.*

At page 402, M.D.H. Fernando J. recapitulated the law as follows:

> *Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist (Siriwardena v. Rodrigo [1986] 1 Sri LR 384, 387). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation*

> *of the time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.*

In *Sriyani De Soyza and others v. Chairman of the Public Service Commission* (SC/FR/206/2008, SC Minutes of 09.12.2016), Prasanna Jayawardena J. stated:

> *However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier.*

Sharvananda C.J. in *Mutuweeran v. The State* (5 Sri Skantha's Law Reports 126 at 130) stated, "*Because the remedy under Article 126 is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. Hence Article 126(2) should be given a generous and purposive construction. The one month prescribed by Article 126(2) for making an application for relief by a person for infraction of his fundamental right applies to the case of the applicant having free access to his lawyer and to the Supreme Court.*" In that case, the petitioner had been in detention from the date of his arrest on 28.07.1986 up to the time of filing the petition on 03.10.1986.

Sharvananda C.J. at page 129 adopted the following criteria in deciding the time limit: "*In my view, Article 126(2) postulates a person whose freedom of movement is not fettered by being kept in custody or detention, who has free access to the Supreme Court to apply for relief under Article 126 of the Constitution.*"

In *Azath Salley v. Colombo Municipal Council and others* [2009] 1 Sri LR 365 at 384, Bandaranayake J. (later C.J.) remarked:

> *Considering the provisions contained in the Constitution dealing with the fundamental rights jurisdiction and the applicability of Article 126(2) read with Article 3,4(d) and 17, it is apparent that Article 126(2) should be interpreted broadly and expansively. Where a person therefore complains that there is transgressing the law or it is about to transgress, which would offend the petitioner and several others, such a petitioner should be allowed to bring the matter to the attention of this Court to vindicate the rule of law and to take measures to stop the said unlawful conduct. Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public.*

On the facts and circumstances of this case, I take the view that the application of the petitioners in the instant case is not barred by time in view of the position taken up by the petitioners (which I have no reason to refuse) that they became aware of the violation on 05.02.2021.

Infringement of Article 12

The main complaint of the petitioners is that they have been denied the equal protection of the law guaranteed by Article 12(1) under which "*All persons are equal before the law and are entitled to the equal protection of the law*".

Seniority category

The petitioners contend that when they joined as Sub Inspectors in 2013, the 2010 scheme had been in place and therefore they had a legitimate expectation of being promoted to the rank of IP upon completion of eight years of service. This argument is unacceptable as that scheme was adopted on a provisional basis to address the frustration of senior officers due to stagnation in service. Such a temporary solution as against an established practice cannot found the basis for legitimate expectation.

Promotion is an important part of any institution. No institution can run effectively and efficiently if seniority is the sole criterion for promotion, disregarding merit. This is not undervaluing seniority. Seniority should be given due recognition but it should not be the only criterion because seniority and competency do not always go hand in hand. If the principles of meritocracy are given due place, there will be a sense of accomplishment and fulfilment. It will encourage innovations and increase productivity, which will in turn positively affect the steady growth of the institution. But favouritism should not play a role in promotion. There shall be a promotion policy. The weightage given to seniority *vis-à-vis* merit may vary. A right balance should be struck when considering merit and seniority.

In P7, under the merit category, it is mandatory that officers should have five years' experience as Sub Inspectors. Under the seniority category it is eight years. This goes to show that under the merit category, seniority has not been disregarded.

M.D.H. Fernando J. in *Perera v. Cyril Ranatunga, Secretary Defence and others* [1993] 1 Sri LR 39 at 43 observes:

> *The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to*

> *earn, or to deserve. In my opinion, "merit" must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks promotion. In relation to the individual officer, there is a negative and a positive aspect: whether there is demerit, e.g. incompetence and poor performance in his present post, and whether there is "positive" merit, such as a high degree of competence and excellent performance. It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skills required for the efficient discharge of the functions of that post, and the service to be rendered. By way of example, an officer who has performed well at a "desk" job, involving little contact with the public, may lack the qualities required for a post in the "field", or involving constant contact with the public, whereas a junior officer whose performance was only average at the "desk" job, may have all the aptitudes and skills required for duties in the field, or involving the public. To ignore the requirements of the post and the needs of the public would be to permit the unrestricted application of the "Peter principle" — that in a hierarchy a person will continue to be promoted until he reaches a level at which he is quite incompetent. "Merit" thus has many facets, and the relative importance or weight to be attached to each of these facets, and to merit in relation to seniority, would vary with the post and its functions, duties and responsibilities.*

The petitioners cited *Perera v. Cyril Ranatunga* to advance their argument on the importance of seniority and that due weightage not being placed on seniority constitutes a violation of the right to equality. It should be noted that in the said case, only 15% of weightage was placed on seniority in a seniority and merit based promotion scheme applicable to the second lowest rung of service. The Court found that due weightage had not been given to seniority because it was in relation to a rank at the bottom of the

hierarchy. In the case of *Dharmaratne and another v. Sri Lanka Export Development Board and 13 others* [1995] 2 Sri LR 324 at 337, M.D.H. Fernando J. observed "*The weightage for seniority must depend on the nature of the post: the greater its responsibilities, the more the justification for giving greater weightage for factors relevant to merit and ability, and performance.*"

In *State of Mysore and another v. Syed Mahmood and others* (1968 AIR 1113 at 1115), the Supreme Court of India observed:

> *Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.*

When considering the hierarchy in the police field, the post of IP is a senior position with greater responsibility as opposed to the post of sergeant. Police posts (as opposed to police stations) are manned mostly by Sub Inspectors. The weightage apportioned to seniority has changed from time to time and, if I may recap, in 2010 it was 100% and eight years of service, in 2016 it was 70% and 10 years of service, and since P7 in 2020 it is 50% and eight years of service. The petitioners did not mount a challenge when the quota for seniority was reduced in 2016 from 100% to 70% and the years of service was increased from eight to 10, but complain when it was reduced from 70% to 50% and the years of service from 10 to eight. There is no justification for this. At the time the petitioners filed these two applications, none of them had completed eight years of service and therefore they could not have applied for promotion on the basis of seniority. In any event, the petitioners themselves admit that there are only about 700 cadre vacancies in the rank of IP and therefore it is unlikely that they will fall within the 50% soon after completion of eight years as there are other officers senior to them.

At the argument, learned President's Counsel for the petitioners submitted that although the petitioners completed their eight years of service on 15.03.2021 and thereby qualified to apply for promotion on seniority basis on 15.03.2021, in X2 dated 05.04.2021, the IGP has arbitrarily fixed the date of completing eight years of service as 31.12.2020 and not from the date of calling for applications (which according to learned President's Counsel is 05.04.2021), in violation of clause 10.2.4.3 at page 24 of P7. I am unable to accept this argument. RTM-121 marked X2 has been signed by the IGP on 05.04.2021 and that date cannot be construed as the date of calling for applications for promotion on seniority basis. X2 also states that completed applications should be handed over to the Senior Deputy Inspector General of Police before 4.00 pm on 01.05.2021. Is it then possible to argue that the last date of calling for applications is 01.05.2021? What X2 states is that eight years of service must be completed by 31.12.2020 and therefore 31.12.2020 should be considered as the point of calculation of the eight years. This is neither arbitrary nor a deviation from the established practice to deliberately prevent the petitioners from being promoted under the seniority category as submitted by the petitioners in their counter affidavit; for instance, P6 is dated 19.02.2020 but the completion of 10 years of service is fixed at 31.12.2018.

There is no disregard of or injustice to the seniority category under the impugned SOR.

Limited Competitive Examination category and Merit category

In order to apply under the limited competitive examination category or the merit category, a SI must have threshold qualifications as set out in paragraphs 10.1.3 and 10.1.4 found at pages 19-21 of P7, which include five years of active service as a SI. There is also a competitive exam for those who apply for the limited competitive examination category. There

is a structured interview for both categories where marks are allocated as follows:

Additional educational qualifications	10 marks
Excellent performances Special appreciations Good entries	25 marks (total) 10 marks 15 marks
Sports	10 marks
Courses (education)	15 marks
Professional competency	20 marks
Medals	10 marks
Interview evaluation	10 marks

Of the sub-categories that fall under the structured interview, the petitioners' only complaint is in respect of the 15 marks allocated for "good entries".

There are two divisions in the Sri Lanka Police, namely the functional division and the territorial division. Broadly speaking, officers in the functional division do administrative work and those in the territorial division do field work. The petitioners in their counter affidavit list out the following as falling under the functional division.

DIG/PHQ	=	*DIG/Police Headquarters*
DIG/PMSD	=	*DIG/Prime Minister Security Division*
DIG/SPR	=	*DIG/Special Protection Range*
D/Civil Admin	=	*Director/Civil Administration*
CA/SLP	=	*Chief Accountant/Sri Lanka Police*
DIG/LOG	=	*DIG/Logistics Range*

DIG/T & C	=	*DIG/Transport & Communication Range*
DIG/R & T	=	*DIG/Recruitment and Training Range*
DIG/Welfare	=	*DIG/Welfare and Medical Service Range*
ED/NPA	=	*Executive Director/National Police Academy*
DIG/Crimes	=	*DIG/Crimes Range*
DIG/PNB	=	*DIG/Police Narcotics Bureau*
DIG/ CP & EP	=	*DIG/Community Police & Environment Protection Range*
DIG/Marine & Tourists	=	*DIG/Marine & Tourists Police Range*
DIG/TR & RS	=	*DIG/Traffic Management and Road Safety Range*
DIG/FFHQ	=	*DIG/Field Force Headquarters*
DIG/R & Tech	=	*DIG/Research & Technology Range*
DIG/Staff	=	*Staff DIG to IG Police*
DIG/Spe.Branch	=	*DIG/Special Branch Range*
DIG/Legal	=	*DIG/Legal Range*
DIG/CID	=	*DIG/Criminal Investigation Department*
DIG/HRM	=	*DIG/Human Resources Management Range*
DIG/Media	=	*DIG/Police Media Range*

COMM/STF	=	*Commandant/Special Task Force*

The petitioners in their counter affidavit say:

> *We state that officers serving under the functional division cannot earn marks nor are they given an opportunity to earn marks allocated for good entries. We state that if 15 marks are given for an officer for a successful investigation carried out while serving in a police station, similarly, marks must be given to those officers serving in the functional division for the work that they do which mostly involves administrative work. A scheme of recruitment should allocate marks in such a way that it gives an opportunity to all those falling under the scheme to earn the said marks.*

Learned DSG in the post-argument written submissions states that the 3rd petitioner in this application and the 70th to 162nd petitioners in SC/FR/55/2021 are serving in the territorial division and therefore this is not an issue common to all the petitioners.

There are 162 petitioners in SC/FR/55/2021. Learned President's Counsel for the petitioners in his post-argument written submissions states that there are 38 petitioners who cannot earn marks for "good entries" because of the nature of their duties. This to my mind means that except for those 38, the others are able to obtain the said marks because they are serving in the territorial division. There are 3 petitioners in this application (SC/FR/46/2021). Of them, the 3rd petitioner is serving in the territorial division. It is clear that the alleged issue is not common to all the petitioners nor to all the prospective applicants, as there are about 700 cadre vacancies in the rank of Inspector of Police.

The petitioners argue that the officers serving in the functional division can neither earn nor are they given an opportunity to earn the marks allocated for good entries. I cannot agree.

It is true that the marks awarded under 2.2.1 to 2.2.4 in P7 for entries pertaining to crime, vice, traffic and open warrants can be earned by an officer serving in a police station (under the territorial division). This does not mean that the officers serving in the territorial division automatically get these good entries. They need to earn the marks; they have to make raids, detect crimes, execute warrants etc. There are inherent risks involved in these activities. If the work that they do is more onerous, they should rightly be in a position to obtain more marks for such tasks.

A scheme could have a criterion under which only a particular division could score marks. However, there should be a mechanism by which others in the same group could also score marks under a particular category so that the scheme of recruitment though seemingly unequal in criteria is just and reasonable in application and effect. The petitioners claim that a total of 15 marks awarded for good entries are denied to them because of the nature of the job of the functional division. The question is whether there is a comparable criterion whereby the aggrieved petitioners could also score 15 marks. When I consider the list of positions that fall under the functional division, as stated by the petitioners in their counter affidavit and quoted by me above, it seems to me that the officers in the functional division are in a better position than those in the territorial division to earn marks for good entries allocated under 2.2.5 and 2.2.6. Take for instance "*2.2.5 – Special activities conducted during the course of duties including community police, traffic or narcotic prevention activities*". According to the petitioners themselves, the Police Narcotics Bureau, Community Police and Environment Protection Range, Traffic Management and Road Safety Range come

under the functional division. Then who is in a better position to engage in special activities such as conducting awareness programmes to earn marks? Marks under 2.2.6 can be earned by any officer irrespective of the division. It may be noted that even under the earlier scheme P5 where 70 marks were allocated for seniority, out of 30 marks, five marks were allocated for good entries. This is not an altogether new feature designed to discriminate against officers in the functional division in favour of those in the territorial division.

The petitioners have also alleged that they had no knowledge at the time of appointment that those involved in crime detection and investigation would be offered more marks. It is true that ideally the scheme of recruitment should be announced beforehand so that officers are aware of what is expected of them in the future. However, it should also be admitted that the schemes of recruitment or promotion have constantly changed in line with emerging needs. It cannot be predicted. Placing a burden on the respondents to announce the exact scheme that would be in place in 10 years or so maybe unreasonable.

In *Wasantha Disanayake and others v. Secretary, Ministry of Public Administration and Home Affairs and others* [2015] 1 Sri LR 362 at 367 Sripavan C.J. stated:

> *A scheme of recruitment once formulated is not good forever; it is perfectly within the competence of the appropriate authority to change it, rechange it, adjust it and re-adjust it according to the compulsions of changing circumstances. The Court cannot give directions as to how the Public Service Commission should function except to state the obligation not to act arbitrarily and to treat employees who are similarly situated equally. Once the Public Service Commission lays down a scheme, it has to follow it uniformly. Having laid down a definite scheme of promotion, the*

Public Service Commission cannot follow the irrational method of pick and choose.

It may also be relevant to note that under 2.2.2 and 2.2.3, one must have 25 entries to earn one mark whereas under 2.2.5 one can earn three marks and under 2.2.6 one can earn one mark for each two entries.

More importantly, officers in the functional division are in a more favourable position to earn marks for education, as their duties are largely confined to office hours with time off during the evenings, weekends and holidays to pursue higher studies, whereas officers in the territorial division (e.g. an officer in the crime or traffic branch) have to work practically round the clock in rotation all seven days of the week and can hardly find the time to do so. In practical terms, officers who are in the territorial division and wish to pursue higher studies shift to the functional division. That is common to any department or discipline. The IGP in his affidavit states that officers are entitled to get transfers to the functional division or territorial division according to their preference upon completion of three years in the police force.

To start with, in practical terms, the duties of officers in the functional division allow them more of an opportunity to apply under the limited competitive examination category for which 25% of vacancies has been set apart.

Under the structural interview in P7, if I may highlight some features: under paragraph 1, 10 marks have been allocated for additional academic qualifications such as degrees and diplomas; under paragraph 4, 15 marks for courses; under paragraph 5.4, seven marks for computer literacy. For these items alone, an officer in the functional division, having had more time due to the nature of his employment to dedicate to higher studies, could earn 32 marks as against the 15 marks an officer

in the territorial division could earn on good entries. Moreover, good entries die a natural death upon promotion whereas academic qualifications do not. It seems that the new scheme is more advantageous to the officers in the functional division than in the territorial division.

I reject the submission made on behalf of the petitioners in the post-argument written submissions that "*the petitioners have no way of being promoted to the rank of IP under the seniority category, based on the competitive examination or based on merit*" and that the petitioners have been treated unfairly and unreasonably in violation of Article 12 of the Constitution.

In *Samarasinghe v. The Bank of Ceylon* [1978-79-80] 1 Sri LR 221 it was held:

> *Although employees may be integrated into one class, ie. Sub-Managers, the employees can in the matter of promotion be classified again into two different classes on the basis of any intelligible differentia, as for example educational qualifications, which has a nexus with the object of classification, namely, efficiency in the post to which promotion is to be made. Accordingly, the differential made by the Bank in promotion from the grade of Sub-Manager to Assistant Manager was not unconstitutional.*

There can be a classification for the purpose of promotion, and this will not amount to discrimination. Though officers in both the territorial division and the functional division are all Sub Inspectors, the nature of their work differs and accordingly the manner in which they may obtain marks to attain a promotion also differ. What is required is that the scheme of recruitment should not have a discriminatory effect on any group of officers without reasonable justification. I find no such discrimination in P7.

Special promotion

Special promotions come under the merit category. Of the 25% of vacancies set apart for the merit category, ½ is allocated to special promotions. In other words, 12.5% of the total cadre vacancies is dedicated to special promotions. Paragraph 10.1.5 at pages 22-23 of P7 provides for this. As this allocation is subject to heavy controversy and for better understanding of this provision, let me reproduce this paragraph in full.

10.1.5 විශේෂ උසස් කිරීම

10.1.5.1 සපුරාලිය යුතු සුදුසුකම්:

i. උප පොලිස් පරීක්ෂක තනතුරේ පත්වීම ස්ථිර කර තිබීම

ii. විශේෂ උසස්වීම කමිටුම මගින් විශේෂ උසස්වීම සඳහා සුදුසු **බවට <u>නිර්දේශ කර තිබීම</u>**

<u>හෝ</u>

iii. **<u>පොලිස්පතිගේ මතය අනුව</u>** යම් විශේෂ අවස්ථාවක දී **<u>තම විශ්වාසය අනුව</u>** විශේෂ උසස්වීම් සඳහා සුදුසු යැයි **<u>නිරණය කර තිබීම</u>**

සටහන: ඉහත පරිදි විශේෂ උසස්වීමක් නිලධාරයාගේ ආධුනික කාලය තුල ලබාදුන් අවස්ථාවකදී නිලධරයා තනතුරේ පිහිටුවිය යුත්තේ ඔහුගේ සේවය ස්ථිර කල දින සිටය.

10.1.5.2. විශේෂ උසස් කිරීමේ කමිටුව: පහත සංයුතියෙන් යුක්ත විශේෂ උසස්වීම කමිටුවක් විය යුතුය.

i. පරිපාලන කටයුතු භාර, ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයා

ii. මානව සම්පත් කළමනාකාර විෂය භාර ජ්‍යෙෂ්ඨතම නිලධරයා

iii. නීති කටයුතු භාර ජ්‍යෙෂ්ඨතම නිලධරයා

සටහන: පරිපාලන කටයුතු භාර, ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයා යටතේ ඉහත අංක (ii) හා (iii) විෂයන් තිබුණද, එම විෂයන් භාර ජ්‍යෙෂ්ඨතම නිලධරයා මෙම කමිටුවට ඇතුළත් විය යුතුය.

10.1.5.2.1. විශේෂ උසස් කිරීමේ කමිටුව පත් කරන බලධාරියා: ජාතික පොලිස්

කොමිෂන් සභාව විසින් බලය පවරන ලද පොලිස්පති

10.1.5.3. උසස් කිරීමේ ක්‍රමය:

i. ස්ථානභාර නිලධාරීන්, දිස්ත්‍රික් භාර නිලධාරීන්, කොට්ඨාස භාර නිලධාරීන්, දිසා භාර නිලධාරීන් හෝ පළාත් භාර ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරුන් විසින් පොලිස් සේවාවේ උන්නතිය වෙනුවෙන් හෝ පුරවැසියන්ගේ ආරක්ෂාව සැලසීම නීතිය හා සාමය පවත්වාගෙන යාම වෙනුවෙන් අති විශිෂ්ඨ වූ දක්ෂතා දක්වන ලද නිලධරයකුට විශේෂ උසස්වීම් ලබාදීම සුදුසුයැයි රේඛීය විධානයන්ට යටත්ව පොලිස්පති වෙත නිර්දේශ කළ හැකිය.

ii. පොලිස්පති විසින් උසස් කිරීම් ක්‍රමවේදයන් ක්‍රියාත්මක කරනු ලබන අවස්ථාවන් හීදි විශේෂ උසස්වීම් ලබාදීම සඳහා ඉහත පරිදි විශේෂ උසස්වීම් කමිටුව පත් කිරීම සඳහා කටයුතු කර, ලැබී ඇති නිර්දේශ කමිටුව වෙත යොමු කළ යුතුය.

iii. ඒ සඳහා පත් කරනු ලැබූ කමිටුවක් මඟින් විශේෂ උසස්වීම් නිර්දේශ කරනු ලබන අතර, කුසලතා පදනම යටතේ ඇති පුරප්පාඩු වලින් උපරිම 50% ක ප්‍රමාණයක් **<u>පොලිස්පතිගේ අභිමතය</u>** පරිදි ලබාදිය හැකිය.

iv. විශේෂ උසස් වීමේ කමිටුව විසින් උසස් කිරීම සඳහා සුදුසු යැයි තීරණය කරනු ලබන නිලධරයන් පිළිබඳ **<u>නිර්දේශ</u>** පොලිස්පති වෙත ඉදිරිපත් කිරීමෙන් පසු පොලිස්පති විසින් විශේෂ උසස්වීම් ලබාදෙනු ඇත.

v. එසේ වුව ද, **<u>පොලිස්පතිගේ මතය</u>** අනුව යම් විශේෂ අවස්ථාවක දී **<u>තම විශ්වාසය අනුව</u>** සුදුසු යැයි තීරණය කරනු ලබන නිලධරයකුට විශේෂ උසස්වීම ලබාදිය හැකිය.

සටහන: විශේෂ උසස්වීම ලබාදීමේ දී එසේ ලබාදීමට තීරණය කරනු ලබන හේතු යම් අධිකරණයක දී හෝ වෙනත් අධිකාරියක් විසින් ප්‍රශ්න කරනු ලැබුවහොත් ඉදිරිපත් කිරීම සඳහා එම නිලධරයාගේ පුද්ගලික ගොනුවට ලිඛිතව ඇතුලත් කළ යුතුය.

Learned President's Counsel for the petitioners strenuously submits that the unqualified discretion given to the IGP under this category is arbitrary

and discriminatory and therefore clearly violates Article 12(1) of the Constitution.

Learned DSG, drawing attention to Rule 44(1) and also to Rule 30 of the Supreme Court Rules 1990, submits that the petitioners did not refer to the power of the IGP to grant special promotions in the petition or even in their written submissions filed prior to the argument as a cause for complaint and thereby denied the IGP an opportunity to meet this argument in his objections filed by way of an affidavit.

Whilst strongly relying on the judgment of S.N. Silva C.J. in *Jayasinghe v. The National Institute of Fisheries and Nautical Engineering (NIFNE) and others* [2004] 1 Sri LR 230, learned DSG submits that this Court should not entertain such a new position taken up for the first time at the argument stage. *Jayasinghe's* judgment has no direct bearing to solve the issue at hand. It was an extreme case where a petitioner in a fundamental rights application filed a petition which was unmistakably not only lengthy, verbose and prolix but also slanderous, abusive of the character of the respondents, false and baseless. Although the petition contained as many as 113 paragraphs, the petition did not contain an averment as to the manner in which the petitioner's complaint (interdiction) infringed his fundamental right guaranteed by Article 12(1) of the Constitution. It is in that context that the Supreme Court referred to Rule 44(1)(a) and sections 40(d) and 46(2)(a) and (b) of the Civil Procedure Code. It is not an authority to say that in a fundamental rights application, a petitioner cannot raise at the argument a new matter that has not been expressly pleaded in the petition. There is no complaint in the instant case that the petition is lengthy and prolix or contains averments which are scandalous or false.

It is also significant to note that the new matter raised arises out of the same impugned document P7, not out of a new document introduced for

the first time at the argument. The two cases are, therefore, incomparable.

It is undisputed that the fundamental rights declared and recognised in our Constitution are based on the Universal Declaration of Human Rights. If there is a *prima facie* case of a violation of fundamental rights, can the Supreme Court turn a blind eye to it on the basis that it has not been expressly pleaded in the original application? I think not.

A fair reading of Part IV of the Supreme Court Rules 1991 in the proper context does not lend support to such a restrictive view. Rule 44(7) enables any person in indigent circumstances to invoke this jurisdiction without formalities. If the Supreme Court decides to entertain such an informal complaint, such person is afforded legal aid for the effective presentation of his case – *vide Sumanadasa and 205 others v. Attorney General* [2006] 3 Sri LR 202 at 205.

It is significant to note that Article 17 found in the fundamental rights chapter of the Constitution recognises as a fundamental right the entitlement of every person to apply to the Supreme Court under Article 126 when there is an infringement or imminent infringement by executive or administrative action of a fundamental right to which such person is entitled.

In terms of Article 126(1) of the Constitution, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognised by Chapter III of the Constitution. It is the constitutional duty of the Supreme Court not to frustrate or diminish fundamental rights jurisdiction by self-imposed fetters but rather to cherish, respect, secure and advance fundamental rights.

The *SVASTI* of the Constitution whilst recognising the Constitution as the "*SUPREME LAW*" of the Republic *inter alia* assures "*to all Peoples… FUNDAMENTAL HUMAN RIGHTS…as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA*".

Article 3 of the Constitution states that "*In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise*." Article 3 ties sovereignty to *inter alia* fundamental rights and makes sovereignty inalienable. This is a unique feature in our Constitution.

The traditional meaning of sovereignty is the power or supreme authority of the State. But under our Constitution sovereignty is not the power or supreme authority of the State but the power or supreme authority of the People, as sovereignty is in the People. How the legislative power, executive power and judicial power of the People shall be exercised is set out in Article 4(a), (b) and (c) of the Constitution.

Article 4(d) states "*the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided*". The restrictions are contained in Articles 14A(2) and 15. According to Article 83, Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2) and 62(2) are entrenched Articles that cannot be restricted (except by two-thirds majority in Parliament and the approval of the People at a Referendum).

What is meant by "*all the organs of government*" referred to in Article 4(d)? The three organs of government are the Legislature, Executive and Judiciary. Therefore it is the constitutional duty of all Courts including the Supreme Court to respect, secure and advance fundamental rights

and not to abridge, restrict or deny them except to the extent such rights have been abridged, restricted or denied by the Constitution itself. This is further reinforced under chapter XVI of the Constitution dealing with "The Supreme Court" where it states in Article 118(b) that "*The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise jurisdiction for the protection of fundamental rights*", not merely for the enforcement of fundamental rights.

In *Edirisuriya v. Navaratnam and others* [1985] 1 Sri LR 100 at 106, Ranasinghe J. (later C.J.) declared:

> *Article 126 (1) of the Constitution has conferred upon this Court sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter 3 of the Constitution. The right to invoke such jurisdiction by an aggrieved person is set out in Article 17, which has been given the status of a fundamental right itself. Article 4(d) of the Constitution has ordained that the fundamental rights which are declared and recognized by the Constitution should be respected, secured and advanced by all the organs of government and should not be abridged, restricted or denied save in the manner and to the extent provided by the Constitution itself. A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations.*

In *Sumanadasa and 205 others v. Attorney General* (*supra*), complaints (not formal fundamental rights applications) were addressed to the Supreme Court by 206 persons held in remand custody upon orders made by Magistrates in respect of offences punishable in terms of section 45 of the Immigration and Emigration Act, alleging infringement of their fundamental rights guaranteed by Article 13(2) of the Constitution resulting from continuous detention without any recourse to a remedy until the conclusion of their trials. S.N. Silva C.J. whilst holding that Article 13(2) had been violated, at page 212 observed:

> *The Court has to consider the ambit of the fundamental right guaranteed by Article 13(2) and the relief, if any, to be granted to the Petitioners in the absence of a procedure established by law to adjudicate on their continued detention.*
>
> *In this context we note that in terms of Article 118(b) of the Constitution this Court is vested with jurisdiction" for the protection of fundamental rights". The word "Protection" is wider than the word "enforcement". It is incumbent on this Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.*
>
> *Fundamental rights forms part of the sovereignty of the People and Article 4(d) of the Constitution being a basic provision on which the structure of our Constitution is founded, requires that fundamental rights be "respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided."*
>
> *Hence the rights guaranteed to the Petitioners in terms of Article 13(2) should be secured and advanced by this Court and not be abridged, restricted or denied. Any such abridgment, restriction or*

denial has to be based only on specific provisions of the Constitution itself.

Ganeshanantham v. Vivienne Goonewardene and three others [1984] 1 Sri LR 319 at 330-331, Samarakoon C.J. emphasised the importance of giving purposive interpretation to Article 126(2). There is no necessity to name in the petition exactly the state officer by whom the petitioner's fundamental right or rights were violated. The unlawful act gives the Court jurisdiction to entertain the petition and to make a suitable declaration. The inquiry is not limited to the person named in the petition.

> *The jurisdiction granted to this Court by Article 126 of the Constitution concerns fundamental rights and language rights declared by Chapters III and IV of the Constitution. In exercising this jurisdiction the Court has to make a dual finding, viz.,*
>
> *(1) Whether there is an infringement or threatened infringement of a fundamental right, and*
> *(2) Whether such infringement or threat is by executive or administrative action.*
>
> *If the answer to the first is in the negative the second does not arise for consideration. If the answer to the first is in the affirmative then the question arises as to whether the act complained of constitutes executive or administrative action. It may not always be possible for the petitioner to allege in his petition that the act was that of a particular officer of State. His name may not be known to the petitioner, and he may only be able to identify him by other means. For example in the course of the inquiry he may be able to establish that it was a police officer of a named Police Station. This Court would then have jurisdiction to act in terms of Article 126. On*

the other hand it may be that in the course of the inquiry it transpires (as happened in the instant case), and it is established to the satisfaction of the Court, that the infringement was by a State Officer other than the one named in the petition. This Court would still have the power to act in terms of Article 126. The jurisdiction of this Court does not depend on the fact that a particular officer is mentioned by name nor is it confined to the person named. The unlawful act gives the Court jurisdiction to entertain the petition and to make a declaration accordingly. The fact that it was committed by an Officer of State empowers the Court to grant a remedy. The provisions of Article 126(2) do not limit the inquiry to the person named in the petition. Such a limitation is apparent in the provisions of Article 126(3) where the inquiry is confined to the party named in the application for a writ in respect of whom the Court of Appeal makes the reference. Article 4(d) of the Constitution enjoins all organs of Government to respect, secure and advance the fundamental rights declared and recognized by the Constitution. This Court being a component part of the judiciary, which is one of the organs of Government, must necessarily obey such command. It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, it yet dismisses the petition because it is established that the act was not that of the Officer of State named in the petition but that of another State Officer, such as a subordinate of his. The provisions of Article 126(2) cannot be confined in that way. This Court has been given power to grant relief as it may deem just and equitable – a power stated in the widest possible terms. It will be neither just nor equitable to deny relief in such a case. Counsel for the Petitioner referred to the provisions of Rule 65 and called in aid its terms to buttress his argument. Rule 65 merely states that the Petitioner shall name the person who he alleges has committed the unlawful act. This by no

> *means exhausts the avenues available to a petitioner. As I have stated earlier it does not provide for a situation where the petitioner is unable to name the Officer of State who commits the act. Furthermore Rule 65 concerns procedure and like most rules cannot detract from the powers of Article 126. I therefore reject the contention raised in issues A1 and 2 by Counsel for the petitioner.*

In *Centre for Environmental Justice (Guarantee Limited) and others v. Hon. Mahinda Rajapaksha and others* (SC/FR/109/2021, SC Minutes of 01.12.2021), it was observed that the procedural defects of fundamental rights applications should not shackle the constitutional duty of the Court to examine the allegations of the petitioner stated therein. In this case, on behalf of the respondents, the Attorney General objected the original petition being amended on three grounds: non-joinder of parties, time-bar and the amended petition being filed to cure the defects in the original petition which were brought to the notice of Court on behalf of the respondents. Rejecting these objections, Janak de Silva J. observed:

> *The heart of the Petitioners' complaint is that the 1st and 2nd Respondents and the Cabinet of Ministers are interfering with the statutory powers of the Attorney General.*
>
> *This is a serious allegation, which if true, has far reaching ramifications. According to Article 4(d) of the Constitution, it is the bounden duty of this Court to secure and advance the fundamental rights guaranteed by the Constitution. These are proceedings brought on behalf of the public at large. I hold that this Court must not allow procedural defects of the nature alleged in this matter to shackle its constitutional duty to examine the allegation of the Petitioners at the leave to proceed stage.*

This constitutional duty resting on the Supreme Court has been reiterated in a spate of Supreme Court judgments including *Sriyani Silva v. Iddamalgoda, OIC, Police Station, Paiyagala* [2003] 2 Sri LR 63, *Piyasena v. Attorney General and others* [2007] 2 Sri LR 117, *Azath Salley v. Colombo Municipal Council* (*supra*).

The Supreme Court has been conferred with wide powers to grant relief in a fundamental rights application. Article 126(4) empowers the Supreme Court "*to grant such relief or make such directions as it may deem just and equitable*" depending on the facts and circumstances of each individual case. The three components may be highlighted for emphasis: (a) grant relief or (b) make declarations (c) as the Court may deem just and equitable. The Supreme Court exercises equitable jurisdiction in fundamental rights applications. Hence this Court in appropriate cases can overlook high-flown technical objections, such as the one raised here, in the interest of justice.

Although the petitioners have not challenged the special promotion scheme in the petition, this matter was raised at the argument and the learned DSG was given an opportunity to reply in the post-argument written submissions. Let me quote the stand of the IGP on this issue of special promotions as reflected in the written submissions:

> *54. Without Prejudice to the above, it is submitted on behalf of the Respondents that in terms of the Scheme of Recruitment marked P7 officers are promoted to the rank of Inspector of Police under three categories. The said categories are 50% on seniority, 25% on merit and the balance 25% through a competitive examination.*
>
> *55. Of the 25% that is allocated for the merit category; half of the said 25%, that is a total of 12.5% of the total number of promotions, are allocated for special promotions. Special promotions are granted*

on the recommendations of the Committee. The said Committee is appointed by the IGP with the approval of appointing authority.

56. *It is respectfully stated that the Scheme of Recruitment does not provide for a blanket 12.5% to be given special promotions, instead it stipulates that a maximum of 12.5% can be granted special promotions.*

57. *Furthermore, it is pertinent to note that although clause 10.1.5.1 provides that the IGP may grant special promotions when he is of the belief that an officer is eligible to be thus promoted, the Note at page 18 of the Scheme of Recruitment specifically provides that in a particular year only a maximum of 10 special promotions can be given under this category.*

58. *Thus it is evident that the role of the Committee is not redundant as contended by the Petitioners as appointments have to be recommended by the Committee.*

According to paragraph 10.1.5.1, the eligibility criteria for special promotion is confirmation in the post of SI, recommendation by the Special Promotion Committee for promotion (විශේෂ උසස්වීම කමිටුම මගින් විශේෂ උසස්වීම සඳහා සුදුසු බවට නිර්දේශ කර තිබීම) or (හෝ) the decision of the IGP for promotion which is based on the IGP's opinion of/trust in that officer (පොලිස්පතිගේ මතය අනුව යම් විශේෂ අවස්ථාවක දී තම විශ්වාසය අනුව විශේෂ උසස්වීම් සඳහා සුදුසු යැයි තීරණය කර තිබීම). The coordinating conjunction "or" here is significant: the IGP can act upon the recommendations of the Special Promotions Committee or he can wholly give effect to his unilateral decision based on his personal opinion/trust regarding certain officers. It may also be relevant to note that apart from the IGP having the authority to fill all the vacancies under the special promotion category on his own, he is also not duty bound to accept the recommendations of the Special Promotions

Committee. The Special Promotions Committee only makes recommendations to the IGP but the final decision is taken by the IGP himself and not the Committee. In explaining the parameters of the powers of the IGP in the special promotion scheme, in addition to giving due recognition to his "opinion" (පොලිස්පතිගේ මතය) and "trust" (තම විශ්වාසය අනුව), the word "discretion" (පොලිස්පතිගේ අභිමතය) has also been used in paragraph 10.1.5.3.iii. These are all subjective. The use of the words "opinion", "trust" and "discretion" interchangeably makes it clear that the intention of the framers of this SOR is to give unfettered discretion to the IGP to decide on this special promotion category. Learned President's Counsel for the petitioners submits that such a provision has been incorporated in P7 to accommodate the directions and requests of the powers that be. Where there is a Special Promotion Committee established to recommend persons for promotion under the special promotion category, it is questionable as to why the IGP has also been vested with such discretion to give special promotion. There are no principles, rules or guidelines stipulated under which he should exercise his discretion.

Such unfettered discretion given to the IGP cannot be justified by adding a "Note" after paragraph 10.1.2 of P7 (at page 18 of P7) to say that the reasons for such decisions shall be included in the personal file of the particular officer to be submitted to Court or to any other authority in the event such decisions are challenged.

In *United States v. Wunderlich* (342 U.S. 98 (1951)) at page 156 Justice Douglas stated:

> *Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times,*

> *his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.*

I accept that as the head of the police force, the IGP should possess powers to take decisions for the greater benefit of the police force, but he cannot have unabridged discretion. He can be the Chairman of the Special Promotions Committee and his independent opinion in relation to special promotions can be discussed at the Committee and collective decisions can be taken. If there is no unanimity, the majority decision should prevail. This is the common practice adopted by every responsible institution, including in the promotion of judicial officers.

In *Munasinghe v. Vandergert* [2008] 2 Sri LR 223 at 232, Bandaranayake J. (later C.J.) observed:

> *Considering the present day administrative functions, there is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless, such discretionary authority cannot be absolute or unfettered as such would be arbitrary and discriminatory, which would negate the equal protection guaranteed in terms of Article 12(1) of the Constitution.*

Article 12(1) of the Constitution ensures protection from arbitrariness and discrimination by executive or administrative action. The objective of Article 12(1) of the Constitution therefore is to ensure equal treatment. In *Ariyawansa and others v. The People's Bank and others* [2006] 2 Sri LR 145 at 152 Bandaranayake J. stated:

> *The concepts of negation of arbitrariness and unreasonableness are embodied in the right to equality as it has been decided that any action or law which is arbitrary or unreasonable violates equality.*

In the determination of this Court in *The Special Goods and Services Tax Bill* (SC/SD/1-9/2022, page 36), it was held:

> *absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision-making, (ii) abuse of power, (iii) corruption, and (iv) the roadway to depredation of the Rule of Law. On all such accounts, it results in an infringement of Article 12(1) of the Constitution which guarantees equal protection of the law.*

In *Royappa v. State of Tamil Nadu and another* (1974 AIR 555 at 583) Bhagwati J. observed:

> *Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.*

In *Ramana Dayaram Shetty v. The International Airport Authority of India and others* (1979 AIR 1628 at 1638) Bhagwati J. stated:

> *The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of*

> *the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.*

In *Ajay Hasia v. Khalid Mujib* (1981 AIR 487 at 499), after considering the concept of reasonableness and its applicability, Bhagwati J. stated, "*the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.*"

In *Jaisinghani v. Union of India and others* (1967 AIR 1427 at 1434) Ramaswami J. observed:

> *[T]he absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey - "Law of the Constitution" - Tenth Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. United States v. Wunderlich, (1951) 342 US 98 "when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It*

> *must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful."*

As observed by Amerasinghe J. in *Perera and nine others v. Monetary Board of the Central Bank of Sri Lanka and twenty-two others* [1994] 1 Sri LR 152 at 166:

> *Transparency in recruitment proceedings would go a long way in achieving public expectations of equal treatment. The selection of a person must be viewed as a serious matter requiring a thoroughgoing consideration of the need for the services of an officer, and a clear formulation of both the basic qualities and qualifications necessary to perform the services, and the way in which such qualities and qualifications are to be established.*

In *Wijerathna v. Sri Lanka Ports Authority and others* (SC/FR/256/2017, SC Minutes of 11.12.2020), Kodagoda J., whilst holding that the petitioner's fundamental right under Article 12(1) had been violated by the failure to appoint him to a particular post, observed:

> *In my view, principally, schemes for the selection, appointment and promotion of persons for employment positions should contain mechanisms enabling the selection of the most suitable person for the relevant position, whilst embodying the principle of equality. The objective sought to be achieved by doing so, is the imposition of compulsion on persons in authority who are empowered to take decisions relating to selections, appointments, recruitment and promotions, to arrive at objective and reasonable decisions, and thereby securing protection against arbitrary decision-making. While conferring discretionary authority on elected and appointed higher officials is necessary, it is equally necessary to ensure that, such discretion is exercised for the purpose for which discretionary*

> *authority has been conferred, and not for the purpose of giving effect to personal objectives which are inconsistent with equality and influenced by irrational and subjective criteria. In all probability, the conferment of unregulated discretionary power would result in violations of the rule of law, and arbitrary, unreasonable and capricious decision-making, and should therefore be avoided at all cost.*

I take the view that the special promotion provision contained in paragraph 10.1.5 of P7 (at pages 22-23 of P7) insofar as the powers of the IGP are concerned is absolute, unfettered and arbitrary. Arbitrariness in the decision-making process violates Article 12(1), which guarantees equal protection of the law. Hence I hold that the fundamental right of the petitioners guaranteed by Article 12(1) of the Constitution is violated to that extent by P7 and I further declare that the special promotion provision in P7 is a nullity. I direct that the 1st to 10th respondents (the IGP and the members of the Public Service Commission) revisit that section of P7 and revise it in order to protect the fundamental rights of the petitioners.

Infringement of Article 14(1)(g)

The petitioners complain of the violation of Article 14(1)(g) of the Constitution, which states: "*Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise*". This is not an entrenched provision. It is subject to Article 15(5), 15(7) and 15(8):

> *15(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to –*

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

15(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

15(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

The right to a profession/occupation of one's choice goes hand in hand with the corresponding duty of every person in Sri Lanka to work

conscientiously in his chosen occupation, as articulated in Article 28 of the Constitution.

In *Vasudewa Nanayakkara v. Choksy, Minister of Finance and others* (SC/FR/209/2007, SC Minutes of 13.10.2009) Bandaranayake J. (later C.J.), quoting the pronouncement of Lord Denning in *Nagle v. Feilden and others* ([1966] 1 All E.R. 689 at page 694) that "*…a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work*", proceeded to hold:

> *It is therefore the paramount duty of Courts to ensure that a citizen's right to work is protected. The right to employment being a fundamental right guaranteed by the Constitution, it would be the duty of the Court to exercise their authority in the interest of the individual citizen and of the general public to safeguard that right.*

Where the state is the employer, the violation of Article 14(1)(g) has been found in instances such as the arbitrary discontinuation of employment (*Nimal Bandara v. National Gem and Jewellery Authority* (SC/FR/118/2013, SC Minutes of 13.12.2017) and the arbitrary suspension of an appointment (*Sisira Senanayake v. Land Reform Commission* SC/FR/190/2016, SC Minutes of 15.02.2017).

The equivalent to Article 14(1)(g) of our Constitution is Article 19(1)(g) of the Indian Constitution, which states: "*All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.*"

The Supreme Court of India has held that where an administrative, executive or non-legislative body has been vested with uncontrolled discretion that would negatively impact the fundamental right to practice

any profession, occupation, trade or business, a finding of the violation of such right can be made.

In *Municipal Corporation of the City of Ahmedabad and others v. Jan Mohammed Usmanbhai and another* (1986 AIR 1205) at page 1210 R.B. Misra, J. observed:

> *Where the law providing for grant of a licence or permit confers a discretion upon an administrative authority regulated by rules or principles, express or implied, and exerciseable in consonance with the rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law ex facie infringes the fundamental right under Art. 19(1)(g).*

In *Liberty Cinema v. The Commissioner, Corporation of Calcutta and another* (1959 AIR Cal 45) D.N. Sinha, J. at page 53 stated:

> *In my opinion, it is now firmly established that an uncontrolled and arbitrary power without any restriction whatsoever cannot be granted to the executive or a non-legislative body, if it is possible by the exercise of such power to affect the rights guaranteed to a citizen to carry on trade or business.*

In *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries* [1985] 1 Sri LR 285, the contention of the petitioner was that his compulsory retirement from government service amounted to a violation of his fundamental rights guaranteed under Article 12 and 14(1)(g) of the Constitution to engage in his profession as a surveyor. By majority decision, the Supreme Court held that a violation of Article 12(1) had not been established. Thereafter Sharvananda C.J. stating that "*Counsel for the petitioner correctly did not*

press the ground that the action of the respondents had infringed the petitioner's fundamental right of freedom to engage in any lawful occupation, as provided by Article 14(1)(g)" expressed the following opinion *obiter* at pages 323-324:

> *The right of the petitioner to carry on the occupation of surveyor is not, in any manner, affected by his compulsory retirement from government service. The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the services of a worker are terminated wrongfully, it will be open to him to pursue his rights and remedies in proper proceedings in a competent court or tribunal. But the discontinuance of his job or employment in which he is for the time being engaged does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed by Article 14(1)(g) of the Constitution. It is not possible to say that the right of the petitioner to carry on an occupation has, in this case been violated. It would be open to him, though undoubtedly it will not be easy, to find other avenues of employment as a Surveyor. Article 14(1)(g) recognises a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. The compulsory retirement complained of, may at the highest affect his particular employment, but it does not affect his right to work as a Surveyor. The case would have been different if he had been struck off the roll of his profession or occupation and thus disabled from practising that profession.*

In *Syed Khalid Rizvi and ors. v. Union of India and ors.* (1992 Supp (3) SCR 180 at 214), Ramaswamy J. stated:

> *No employee has a right to promotion but he has only right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. Take an illustration that the Promotion Regulations envisage maintaining integrity and good record by Dy. S.P. of State Police Service as eligibility condition for inclusion in the select list for recruitment by promotion to Indian Police Service. Inclusion and approval of the name in the select list by the U.P.S.C, after considering the objections if any by the Central Govt. is also a condition precedent. Suppose if 'B', is far junior to 'A' in State Services and 'B' was found more meritorious and suitable and was put in a select list of 1980 and accordingly 'B' was appointed to the Indian Police Service after following the procedure. 'A' was thereby superseded by 'B'. Two years later 'A' was found fit and suitable in 1984 and was accordingly appointed according to rules. Can 'A' thereafter say that 'B' being far junior to him in State Service, 'A' should become senior to 'B' in the Indian Police Service. The answer is obviously no because 'B' had stolen a march over 'A' and became senior to 'A'. Here maintaining integrity and good record are conditions of recruitment and seniority is an incidence of service.*

The right to engage in a lawful profession is infringed if that right is "unlawfully obstructed". *Vide Mrs. W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation* [1989] 2 Sri LR 393 at 407-408.

In *Siriwardena and another v. Inspector, Police Station, Ambalangoda* (SC/FR/242/2010, SC Minutes of 30.04.2021), the petitioners who are Attorneys-at-Law went to the Ambalangoda police station as part of their professional duties to assist a client of the 1st petitioner in a matter involving the custody of a child. The petitioners contended that the 1st respondent, an Inspector of Police, and the 2nd respondent, a Sub-Inspector of Police, verbally abused, threatened, humiliated and

intimidated the petitioners, even after having been informed that they were Attorneys-at-Law, and the 2nd respondent degraded the petitioners in front of members of the public by *inter alia* casting aspersions on the legal profession, causing severe embarrassment and humiliation to the petitioners. The petitioners filed an application before the Supreme Court alleging violation of their fundamental rights guaranteed under Articles 11, 12(1) and 14(1)(g) of the Constitution. The Supreme Court held that the respondents violated the fundamental rights of the petitioners guaranteed by the said Articles. Article 14(1)(g) was held to have been violated by the interference with their freedom to engage in their lawful occupation. Thurairaja J. declared:

> *It is my view that the treatment meted out to the Petitioners by the 1st and 2nd Respondents is a violation of their rights under Article 11 of the Constitution. Further it is a violation of the Petitioners' rights under Article 12 and 14(1)(g) of the constitution as it is an interference with their freedom to engage in their occupation, particularly given that this incident was an occurrence during their exercise of duties as are demands of their occupation, in the best interest of the 1st Petitioner's client.*

If we are to respect, secure, advance and protect the fundamental right of citizens to engage in a lawful profession, we need to give a purposive interpretation to Article 14(1)(g) and not a restrictive interpretation that would directly or indirectly abridge, restrict or deny such right. The right to engage in a lawful profession should be understood as the right to effectively engage in a lawful profession. Although a promotion is not a right *per se* of an employee, the unjustifiable denial of consideration for promotion (by virtue of the conferment of unabridged discretion on the IGP) adversely affects the petitioners' right to effectively engage in their lawful employment, in violation of Article 14(1)(g).

I hold that the special promotion provision contained in paragraph 10.1.5 of P7 (at pages 22-23 of P7) insofar as the powers or discretion of the IGP are concerned also violates the fundamental right of the petitioners guaranteed by Article 14(1)(g) of the Constitution.

Doctrine of Severability

The next question is whether, when an impugned administrative decision challenged in a fundamental rights application contains provisions that are violative of fundamental rights and those that are not, the Court can separate the good from the bad and declare only the bad part invalid leaving the good part intact. This is permissible.

I concur with the view of De Silva J. expressed in *Ranatunga v. Commissioner General of Agrarian Development* (CA/WRIT/180/2017, CA Minutes of 17.07.2019):

> *In Thames Water Authority v. Elmbridge Borough Council [1983] 1 Q.B. 570 it was held that where a local authority had acted in excess of their powers, the court is entitled to look not only at the document but at the factual situation and, where the excess of the power was easily identifiable from the valid exercise of power, to give effect to the document in so far as the exercise of the power had been intra vires. In Regina v. Secretary of State for Transport ex parte Greater London Council [1985] 3 WLR 574 it was held that in an appropriate case, certiorari will go to quash an unlawful part of an administrative decision having effect in public law while leaving the remainder valid.*
>
> *However, such severance of the ultra vires part from the intra vires part is subject to qualifications. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing (Agricultural, Horticultural and Forestry*

> *Industry Training Board v. Ayelsbury Mushrooms Ltd. (1972) WLR 190). In R. v. North Hertfordshire District Council ex parte Cobbold [1985] 3 All ER 486] it was held that where a specific part of a licence could be identified as being offensive and therefore unlawful, it could only be severed from the licence so far as to leave the remainder untainted if the severance would not alter the essential character or substance of that which remained. It follows that severance would not be permitted where the words which is sought to sever were fundamental to the purpose of the whole licence.*

In the case of *Siva Sithamparam v. National Paper Corporation and others* [2003] 3 Sri LR 164, Jayasinghe J. held "*Unless the invalid part is inextricably interconnected with the valid the court is entitled to set aside or disregard the invalid part having the rest intact, it is appropriate to sever what is invalid if the character of what remains is unaffected.*"

Similarly in *Pure Beverages Company Executive Officers Association v. Commissioner of Labour* [2001] 2 Sri LR 258 at 271 Yapa J. stated:

> *Further Wade and Forsyth Administrative Law Seventh Edition Page 329 states as follows. "An administrative Act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the Court will quash the bad part only and leave the good standing." Vide also Agricultural, Horticultural and Forestry Industry Training Board Vs. Aylesbury Mushrooms Ltd. Therefore in relation to the decision of the Commissioner dated 24.09.1997 it is clearly possible to sever the good from the bad. Hence the decision of the Commissioner which had been wrongly made, so as to apply to the*

four affected members of the Petitioner Association could be quashed allowing the decision made by the Commissioner in respect of the other employees belonging to the other two trade unions intact.

Conclusion

For the aforesaid reasons, I hold that the seniority category, limited examination category and merit category stipulated in P7 are not violative of Article 12(1) and Article 14(1)(g) of the Constitution; but, under the special promotion category comprising 12.5% of the total vacancies, the discretionary power granted to the 1st respondent IGP is violative of the fundamental rights of the petitioners guaranteed by Article 12(1) and Article 14(1)(g) of the Constitution. The application is partly allowed. Let the parties bear their own costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.
I agree.

Judge of the Supreme Court